Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID S. HAYES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

In an alleged Mann Act conspiracy, can the prosecution theorize that the Act's incorporation of state law criminalizing "sexual activity" reaches corrupting the morals of minors under Pennsylvania law by conduct including the display of pornographic videotapes or photographs?

II.

Whether a conviction can be sustained on the theory that the display of pornographic videotapes or photographs to minors constitutes engaging in "sexual activity" under the Mann Act?

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David S. Hayes	United States of America (Office of the United States Attorney for the Western District of Pennsylvania)

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Other Authority:

H.R. Rep. No. 99-910, 99th Cong., 2nd Sess. 6-7

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit filed a Judgment Order, without opinion, on March 9, 1994. It is not reported. A copy is set forth in the Appendix to this Petition (1a-2a).

The United States District Court for the Western District of Pennsylvania rendered an Opinion in support of its Order of June 8, 1993, denying Defendant's Motion for a New Trial. It is not reported. The substance of that Opinion does not pertain to the questions presented for review.

The Court of Appeals wrote an Opinion in petitioner Hayes' earlier appeal from his sentence after a guilty plea. It is reported at *United States v. Hayes*, 946 F.2d 230 (3d Cir. 1991) (vacating the sentence due to government's violation of the plea agreement). That Opinion does not pertain to the questions presented for review.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1994. Upon Petitioner's application to the Supreme Court of the United States, the time for filing a petition for a writ of certiorari was extended to August 5, 1994.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. § 2421:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2422:

Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2423:

Whoever knowingly transports any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both.

18 Pa.C.S. § 6301(a):

Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists

or encourages such minor in violating his or her parole or any order of court, is guilty of a misdemeanor of the first degree.

STATEMENT OF THE CASE

HISTORY

The indictment charged Hayes with conspiring to commit certain Mann Act (18 U.S.C. §§ 2421-2423) offenses in violation of 18 U.S.C. § 371 (Count One), knowingly transporting an unidentified minor in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. § 2423 (Count Two), knowingly transporting another unidentified individual in interstate commerce for purpose of prostitution and involuntary deviate sexual intercourse, in violation of 18 U.S.C. § 2421 (Count Four), possession with intent to distribute small amounts of marijuana and crystal methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Counts Three and Five), and criminal forfeiture under 21 U.S.C. § 853(a) (Count Six).

On December 3, 1990, pursuant to a plea agreement, Hayes entered a plea of guilty to Counts One, Two, Three and Six of the indictment. On March 11, 1991, he was sentenced (Mencer, J.) to a term of 54 months imprisonment on Count One, three (3) years on Count Two (consecutive), two (2) years on Count Three (concurrent), forfeiture of his residence on Count Six, and a special assessment of $200. On appeal, following Hayes' incarceration, the United States Court of Appeals for the Third Circuit on October 8, 1991, vacated the sentence imposed by the District Court, finding that the government violated the terms of the plea agreement. *United States v. Hayes, supra.* On January 31, 1992, the District Court (Cohill, J.) granted Hayes' motion to withdraw his plea.

On May 8, 1992, following a jury trial, Hayes was convicted on Counts One, Two, Three, and Five; he was acquitted on Count Four. The criminal forfeiture count (Count Six) was dismissed

before trial.[1] On June 25, 1992, he was sentenced to a term of imprisonment of sixty (60) months on Count One pursuant to the Federal Sentencing Guidelines, and to five (5) years on each of the remaining counts, to be served consecutively, for a total of twenty (20) years. These sentences of imprisonment are to be followed by a special parole term of three (3) years. Also, he was fined $50,000, and ordered to pay a special assessment of $200. Immediately after sentencing, Hayes resumed his incarceration.

On March 9, 1994, the United States Court of Appeals for the Third Circuit affirmed the judgment of conviction.

On July 29, 1994, upon consideration of Hayes' Motion for Reduction of Sentence, the District Court reduced his sentence by ordering that the five (5) year sentences on Counts Three and Five shall be served concurrently with each other and with Count Two, which is to be served consecutively to the five (5) year sentence on Count One (for a total of ten (10) years imprisonment).

FACTS

In 1980, the public disclosure of David S. Hayes' long concealed homosexuality resulted in his failure to win reelection to the seat he had held for twelve years in the Pennsylvania state legislature. Hayes underwent a deep depression and withdrew to the Erie, Pennsylvania home he shared with his blind, invalid mother. Ultimately, Hayes sought to alleviate his depression by attracting the company of other people to his basement recreation room.

Among others, Hayes formed friendships with students from nearby Edinboro State University whom he invited to his home. Trial Transcript (TT) 334-335, 1078-1079, 1105-1106. Hayes and his guests would eat, drink beer, smoke marihuana, and watch television and movies, some sexually explicit. TT. 1087-1088, 1112, 1122. In short, Hayes had created a "party

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[1] The forfeiture, which involves the government's efforts to forfeit the Hayes residence, is in civil litigation.

atmosphere" attractive to his new friends. TT. 335. The government established that Hayes received a large number of visitors to his home over the years; many were teenagers from nearby Ohio. TT. 595, 1003-1005.

Hayes often provided food, soft drinks, alcohol and marihuana to his visitors, and frequently gave small amounts of money to his guests for food and gas to return home. A finely ground white powder, called "wakeup" was offered to his visitors to keep them alert for their trip home. While trial evidence was consistent that both Hayes and his guests brought marihuana into his home, there was dispute over whether the "wakeup" was methamphetamine or over-the-counter caffeine substitutes.

Hayes' visitors often brought guests of their own. On occasion, male visitors engaged in consensual sex with their female companions at Hayes' home. TT. 1248, 1358-1360. At other times, Hayes engaged in consensual sex with his male visitors. TT. 1290, 1317, 1352. On a few occasions, Hayes videotaped the sex acts of his guests, often at their request. TT. 1248, 1251, 1290, 1352.

On the night of February 6, 1990, at least twelve federal, state and county law enforcement officials, participating in a state-directed operation, descended upon Hayes' home in Fairview, Pennsylvania. TT. 201, 205. The officers forcibly entered Hayes' house, confronted him with a state-issued search warrant, and conducted an extensive search of his home. TT. 231.

The search warrant authorized the police to seize all "video tapes, photographs, or films that may be used in the corruption of minors," and 148 video tapes were seized. Search Warrant, p. 3. The vast majority of the seized tapes were commercial video tapes; only a handful were homemade video tapes depicting sexual activity. TT. 19, 23, 686-687.

ARGUMENT

INTRODUCTION

This case involves an important issue of federal law which has not been, but should be, settled by this Court.

THE PROSECUTION'S THEORY OF CRIMINAL LIABILITY BASED UPON CORRUPTING THE MORALS OF MINORS UNDER PENNSYLVANIA LAW DOES NOT CONSTITUTE AN OFFENSE UNDER THE MANN ACT.

In the formulation and presentation of its case, the government repeatedly urged the jury to convict Hayes for violating a Pennsylvania statute criminalizing conduct which corrupts the morals of minors by showing pornographic video tapes to guests at his home. *Eg.*, TT. 704-705. The prosecution's broad and vague theory of criminal liability went far beyond the carefully structured limitations contained in the applicable federal statutes. The district court permitted the introduction of highly prejudicial evidence based on this prosecutorial theory and ultimately denied a critical defense instruction which would have clarified for the jury that such activity could not constitute predicate sexual activity under the Mann Act.

A.
FEDERALIZATION OF STATE LAW SEXUAL OFFENSES.

The Act of June 25, 1910, subsequently codified at 18 U.S.C. § 2421-2423, is popularly known as the "Mann" Act. In its original form, the Act prohibited interstate transportation in aid of prostitution or "for any other immoral purpose." Any uncertainty over the contours of prohibited "immoral purpose," *see United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986), was eliminated by 1986 amendments passed as part of the Child Sexual Abuse and Pornography Act of 1986. P.L. 99-628, 100 Stat. 3510. In the House report accompanying the legislation, the provisions redrafting the Mann Act were characterized as designed "to eliminate its anachronistic features . . . ." H.R. Rep. No. 99-910, 99th Cong.,

2nd Sess., at 2 (1986). Certain obsolete terminology referring to "debauchery" and "practice of prostitution" was eliminated.[2] Most importantly, the language "for any other immoral purpose" was deleted. In its place, Congress substituted what it called a "more precise standard" of "engage in . . . any sexual activity for which any person can be charged with a criminal offense." The House report noted that this language was meant to reach transporting for illegal sexual activity under any applicable federal, state or local law. The report went on to find that:

> This is a more appropriate standard for a federal offense than the current vague standard of "immoral purpose," under which the transportation can be an offense even when the conduct for which the transportation takes place "such as non-commercial sex between consenting unmarried adults" violates no law in any of the jurisdictions involved in the travel. This change reflects a proper recognition of community standards regarding acceptable sexual behavior, in that federal law would, in effect, apply those standards.

The effect of the amendment was to incorporate state law criminalizing "sexual activity."

Petitioner is aware of no authority interpreting "sexual activity" to encompass the broad and ill-defined crime of corrupting the morals of minors. The prosecution's presentation of this theory of criminal liability to the jury in this case took the charges beyond the narrow confines established by the 1986 amendments. It reintroduced the very vagueness and ambiguity which Congress sought to strike from the statute.

B.
THE PROSECUTION'S PRESENTATION OF ITS INAPPROPRIATE THEORY OF SEXUAL ACTIVITY.

Count One charged a broad ranging conspiracy to transport individuals to engage in prostitution and "sexual activity for which any person can be charged with a criminal offense." In several

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[2] Another major provision of the 1986 Mann Act amendments was to make the Act gender neutral.

places in Count One, the criminal offense was defined as "corrupting the morals of minors contrary to the provisions of 18 Pa.C.S. § 6103."[3] Section 6301(a) of the Pennsylvania Criminal Code provides in part:

> Whoever . . . by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age . . . is guilty of a misdemeanor of the first degree.

The overall lack of specificity of the indictment did not permit a determination of precisely what conduct constituted the alleged violations of § 6301. The prosecutorial theory, however, was clarified in several pre-trial filings. In an initial trial brief, the government argued that it would prove at trial that Hayes had corrupted the morals of minors by providing them with drugs and displaying obscene and pornographic videotapes to them. Government Trial Brief, October 25, 1990. In its Supplemental Trial Brief (pp. 2-3), the government fleshed out its theory of criminal liability:

> Under Pennsylvania law, corruption of the morals of minors is a broad term involving conduct toward a minor in an unlimited variety of ways which tend to produce or to encourage or continue the conduct of the minor which would amount to delinquent conduct. *Commonwealth v. Meszaras*, 194 Pa. Super. 462, 168 A.2d 781 (1961). Displaying obscene and pornographic materials for minors has been held to be sufficient to support a corruption charge. *Commonwealth v. Shirey*, 481 A.2d 1314, 1338 (Pa. Super. 1984).

The defense argued that the court should exclude various video tapes and photographs since their prejudicial impact outweighed their narrow relevancy. In particular, defense counsel argued that the marginal relevancy of the tapes and photos would appeal to the jury's sense of morality rather than the precise confines of the indictment and statute. The court ruled that it would admit the

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[3]The indictment's reference to Section 6103 was apparently a typographical error. Section 6103 is a firearms statute, while Section 6301 deals with corruption of minors.

video tapes because it viewed displaying obscene or pornographic video tapes as a "proper basis to establish corruption of morals of minors under Pennsylvania law." TT. 26, 34-38.

The first video tape offered into evidence by the government was a tape of a male masturbating that had been exhibited to another individual who was 17 years old at the time. The government argued that the tape was relevant to show corruption of the 17 year old by exhibiting the tape to him. TT. 35. The defense objected that merely showing a tape was not "sexual activity" under the statute, but the court overruled the objection and permitted the introduction of the tape. TT. 38.

Similarly, the defense objected to the introduction of nude photographs of a certain male on relevance grounds. But the court ruled that the nude photographs "fall[ ] within the Pennsylvania definition of sexual conduct." TT. 345-346. Throughout the presentation of its case, the government offered numerous video tapes only to demonstrate that "obscene" or "pornographic" tapes had been shown to minors. During the questioning of several minor witnesses, the government elicited testimony as to whether they had viewed "pornographic" or "obscene" tapes. TT. 153-155; 361-364; 459-461; 597. During none of this questioning did the government engage in any in-depth questioning regarding the content of these tapes. Again, during arguments on motions at the close of the government's case, the defense argued that "sexual activity" under the Mann Act could not reach the expansive view of corrupting the morals of minors offered by the government. TT. 1042. The defense also argued that while there was a specific Pennsylvania criminal statute dealing with the exhibition of obscene materials to minors which contained a definition of obscenity, the jury here had been provided with no evidence that the materials displayed to the minors were either pornographic or obscene. *Id.* TT. 1492-1493. The court denied the motions.

After the court refused to dismiss the corrupting charges, the defense requested an instruction which would have clarified this

critical issue for the jury. The requested defense instruction included the following language:

> While corruption of morals of minors includes a wide variety of activities, for purposes of these instructions, you are to consider only that "sexual activity" which would tend to corrupt the morals of any minor. In this regard, you are not to consider any acts relating to violations of drug laws, ingestion of drugs or alcohol, viewing of pornographic films, or any other non-sexual conduct (emphasis added).

The court denied this requested charge, giving only the first sentence but deleting the underlined cautionary language which would have clarified the undefined term "sexual activity."

The government's only stated rationale for its theory that the display of pornographic films can constitute engaging in sexual activity is that the Pennsylvania Superior Court in *Commonwealth v. Shirey*, 481 A.2d 1314, 1338 (Pa. Super. 1984), has affirmed that the showing of pornographic films to minors constitutes a violation of the state statute prohibiting the corruption of minors. In *Shirey*, the court addressed charges of corrupting based upon the display to a minor of sexually explicit photographs. The court found that the only objection raised by the defendant was that the court had failed to require a showing of community standards to support charges that the photographs were obscene. The court held that the case law relied upon by the defendant to establish the requirement of a showing of community standards had been overruled and that any further arguments by appellants had been waived. Accordingly, the court never addressed the propriety of charging corruption of a minor under the Pennsylvania statute based only upon the display of obscene materials to the minor.

The government has failed completely to offer any other support for its position that, even if corruption under the Pennsylvania statute can include the display of pornographic materials, such an offense can be a Mann Act predicate. The Mann Act prohibits "engag[ing] in . . . any sexual activity for which any person can be charged with a criminal offense." The plain

language of the statute makes it clear that it covers only *engaging* in *sexual* activity. It is only if a person engages in sexual activity that the statute goes on to require that that activity be an offense chargeable as a criminal offense. The display of pornographic films or photos to a minor simply is not sexual activity. While the photos or tapes may display sexual activity, Petitioner has not engaged in any sexual activity.

The government has also argued that even if it was error to permit the jury to convict based on the showing of pornographic films to minors as an overt act of the conspiracy, it was harmless error. The charge of corruption, however, was not an overt act but one of the multiple objects of Count One. Accordingly, if the jury was permitted to convict on an erroneous legal theory, speculation as to any alternative basis for the jury's determination is not permitted. *See Griffin v. United States*, 112 S. Ct. 466 (1991).

At trial, the government also argued for admission of much prejudicial photographic and video tape evidence as relevant to its corruption theory. However, this was an inappropriate basis for the admission of evidence. Although the government attempted on appeal to portray the admission of this evidence as limited to tapes either depicting Hayes visually or orally, the evidence included many photographs and video tapes that did not contain any depiction of Hayes. Moreover, the government's late attempt to construct an alternative basis for the admission of these photographs and video tapes wholly disregards the basis of the court's ruling at the time of admission.

The net result was that the jury was permitted to convict on a theory of criminal liability that encompassed the showing of pornographic films as "sexual activity." As an initial matter, it is doubtful whether corrupting the morals of minors can ever be a Mann Act predicate. It is exactly the kind of vague and ill-defined offense that Congress sought to eliminate by incorporation of state law. Rather than reflecting the reasoned moral judgment of the community through the promulgation of state law, it gives jurors nearly unbridled discretion to pass moral judgment on a defendant. Even if such a statute could be considered as a Mann Act predicate, it would require a careful delineation of "sexual

activity." The rejection of the proffered defense instruction left the jury free to define sexual activity, consistent with the prosecution's presentation of evidence, as including the viewing of pornographic or obscene films. Finally, the failure of the government to introduce any evidence of the pornographic or obscene nature of the films, or of the court to provide any guidance in the form of instructions on what constituted pornography or obscenity, was fatal error.[4]

CONCLUSION

Based on the reasons stated above and the record as a whole, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Thomas A. Livingston
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[4] The district court conceded at sentencing that it had never made a finding that any of the video tapes would satisfy the legal definition of pornography or obscenity. "Indeed, this was not an issue of the case." Sentencing Transcript 5-6, 16-17.

APPENDIX

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-3344 & 93-3309

UNITED STATES OF AMERICA

v.

DAVID S. HAYES,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 90-00019-01E)
District Judge: Hon. Maurice B. Cohill, Jr.

Argued: February 28, 1994

Before: SLOVITER, *Chief Judge,*
ALITO, *Circuit Judge,* and ROBINSON* , *District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

1. The district court erred in denying the motion to suppress evidence because the search warrant was defective and the search was illegally executed.

2. The failure adequately to inform Hayes of the charges against him, in violation of the Fifth and Sixth Amendments, requires reversal.

3. The possession and use of a dictionary by the jury required grant of Hayes' motion for a new trial.

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*. Hon. Sue L. Robinson, United States District Judge for the District of Delaware, sitting by designation.

4. Hayes' conviction on count two should be reversed for insufficient evidence that the "dominant purpose" of the transportation was for prostitution.

5. The prosecution's theory of criminal liability based upon corrupting the morals of minors under Pennsylvania law does not constitute an offense under the Mann Act.

6. The district court erred in refusing to give the proffered defense theory of the case instruction.

It is ORDERED and ADJUDGED that the Judgments of the district court dated June 25, 1992 and June 8, 1993 be and are hereby affirmed.

By the Court,

/s/ D.K. Sloviter
Chief Judge

Attest:

/s/ P. Douglas Sisk
Clerk

Dated: March 9, 1994